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Review of “Private Goods, Public Goods”

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Liberalism and the Public/Private Distinction

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In the first part of what follows, I critique the main argument of Raymond Geuss' *Public Goods, Private Goods*, which the author bills as a genealogical analysis and critique of the contemporary liberal conception of the public/private distinction. Geuss' basic argument is that the genealogical analysis suggests that there is no fundamental aspect of the human condition on which the public/private distinction rests, and that this in turn means that liberals will be unable to draw a principled distinction upon which to rest the general public/private distinction. Geuss concludes that this ultimately undermines liberals' ability to appeal to the public/private distinction in political debates. I argue that even if Geuss is right that the *general* distinction between the public realm and the private realm is not founded in any fundamental aspect of the human condition, it does not follow that *particular aspects* of that general distinction -- for instance, the right to personal privacy -- are not grounded in any fundamental facts about the human condition. I conclude that Geuss has not made a case that liberals are not entitled to appeal to (say) the right to personal privacy in public debates where privacy is an issue. But although Geuss' argument fails, it does not follow that his skepticism about the ability of liberals to explain how the right of privacy (for instance) is grounded in some fundamental aspect of human life is not reasonable. So in the second part of my essay, I examine various attempts to do just that. I conclude that although it is perhaps possible to so ground the right to personal privacy, doing so may not help liberals

in public debates. In short, while I end up agreeing with some of Geuss' general conclusions, I hope to have shown them to be better supported than Geuss does.

I begin with a brief overview of the book. In the first chapter, Geuss sets out his general thesis – that there is no single clear distinction to be drawn between the public realm and the private realm – and traces the contemporary liberal notion of the right to privacy and of the ‘private sphere’ to Benjamin Constant’s distinction between the ‘private existence’ of members of modern society on the one hand and their ‘public existence’ on the other, and to Alexander von Humboldt’s anti-paternalism.

The middle chapters of the book are devoted to case studies that illustrate the different conceptual roots that underlie other aspects of our current public/private distinction. In Chapter II Geuss considers the case of Diogenes masturbating in the Athenian marketplace. Diogenes thought that the best life is a self-sufficient life and that a self-sufficient life requires rejecting arbitrary social conventions, so he rejected the social rule that sexual self-gratification is something one should only do when one can expect to be unobserved by others. According to Geuss, this illustrates the sense in which ‘public’ roughly means “the area where anyone can enter and where the principle of disattendability applies”, meaning that it is a sphere in which one is supposed to behave in such a way that one is unobtrusive so that others can go about their business without having to notice one’s behavior.

In Chapter III Geuss considers the case of Julius Caesar’s crossing the Rubicon in defiance of the Roman Senate’s demand that he give up his military command and return to Rome to stand trial. In so doing, Caesar was putting his own individual interests above those of the citizenry at large. It is the sense of public/private in which we hear politicians and others who, complaining about “special interests”, want the legislature to write laws benefitting them at the expense of the public good.

Geuss’ final case study is that of St. Augustine’s belief that true understanding of oneself and one’s relation to God requires reflection on one’s own ‘internal’ or ‘private’ states of memory and reflection. In this sense, ‘public’ means ‘those facts about an individual that are epistemologically accessible to others’, where ‘private’ means ‘that to which the subject has privileged epistemological access’. So we have three historically different understandings of the way to draw the public/private distinction: (1) the public as the *space* where the principle of disattendability applies, (2) the public as the public interest as opposed to the interest of individuals, (3) the public as those facts about one that are epistemologically accessible to everyone (as opposed to that which is epistemologically accessible only to oneself). (Hereafter, I will refer to each of these senses of ‘public’ in the following way. For (1), I will use ‘Pd’; for (2), I will use ‘Pi’, and for (3) I will use ‘Pe’). Each of these distinct conceptions of the public/private distinction is recognizable in contemporary liberal appeals to what they think of as *the* public/private distinction. These are not the *only* components of the contemporary public/private distinction; in addition, liberals generally believe in a personal right to privacy (Pp), which Geuss thinks can be traced to the anti-paternalism of Alexander von Humboldt and to Benjamin Constant’s distinction between the “private world” of family and other intimate social relationships on the one hand and the “public” world in which individuals participated in democratic institutions. In contemporary society, Pp is the distinction that those who see themselves as civil libertarians emphasize, and is the basis for their arguments in favor of abortion rights, the legalization of recreational drugs and their arguments against laws such as the USA Patriot Act, which allows the government to covertly spy on some citizens. There are two

aspects to this right: (1) the individual right to be free from others' interference with one's activities, so long as those activities do not harm others (anti-parentalism), (2) the individual right to choose to have some *information* about oneself inaccessible to others. Pp can be understood as creating an individual private domain or sphere within which the individual has absolute control and to which others have access only by permission of the individual in question.

The last two chapters of the book, which are the most important for this review, contain Geuss' criticism of the liberal conception of the public/private distinction; Geuss mostly focuses on Pp and the notion of the public good as opposed to the private good. I should note here that *my* discussion focuses primarily on Pp.

Having now briefly sketched to outline of the book, let me now turn to Geuss' criticism of liberalism and that criticism's basis in his genealogy of the public/private distinction. Geuss' main thesis is that:

the public/private distinction does not mark out a single natural division in the world which could give us a straightforward way of orienting ourselves in action and evaluating action; rather, it is a confused conglomeration of very distinct conceptual responses to different human problems and issues. (xix)

Geuss makes both a metaphysical and a methodological claim. The metaphysical point is that the liberal distinction between the public and the private realm is not a distinction that is rooted in any single fundamental fact about human nature (such as, for instance, the fact of our finitude, or our urge for self-preservation), and therefore does not provide the basis for drawing a general principled philosophical distinction between the two. To put it another way, there is no one human need or fact of the human condition to which Pi, Pd, Pe, and Pp are all in one way or another a response. The methodological point, which follows from the metaphysical point, is that

It is...a mistake to answer the question "Why shouldn't we interfere with that?" with "Because it is private" and think that this is the obvious end of the discussion (107).

Geuss does not give a specific instance of the sort of liberal argument he has in mind, but consider the case of the USA Patriot Act, passed shortly after the destruction of the World Trade Center in 2001. The law allows the government to issue secret 'sneak-and-peek' search warrants, allowing federal agents to, for example, examine suspects' computer hard drives without notifying the suspect. Many people have decried the law on grounds that it violates Pp. But if that appeal to the right to personal privacy is not backed up with some plausible account of how the distinction between the public and the private is to be drawn, Geuss will say, we should not accept the appeal to the right to privacy as decisive because

In itself it [the appeal to privacy] merely and tautologically says that we should not interfere because that is the kind of thing we ought not to interfere with. (107)

Geuss rejects the idea that we first formulate a principle for distinguishing what is protected under the Pp and what is not, and then apply it to specific cases such as that of the Patriot Act. Instead, Geuss endorses John Dewey's account of the public/private distinction. What Geuss likes about Dewey's account is that for Dewey, we do not *first* formulate a principle for determining what is

public and what is private, and then apply that principle to every case that comes into dispute. Rather, we first consider what sorts of activities or institutions will have consequences such that they need regulating, and then call those things ‘public’, leaving the rest to the private realm. On Dewey’s view, the public/private distinction *emerges from* our policy decisions; it is not the *justificatory basis for* those decisions. In the concluding chapter, Geuss says:

From the fact that we do not begin with an ontologically realist account of the distinction as a *single, unitary distinction*, it does not follow that we cannot come to a rationally well-supported view that gives us reason to distinguish them for particular purposes in particular contexts. It follows only that the “reason” we will use will be a contextually located human power, not some abstract faculty of reading off the moral demands of the universe from the facts of the case. (113)

Geuss’ view is that once we give up the notion of a single unitary general distinction between the public and the private, we will no longer have need for (say) the right to privacy, because invoking that right will no longer do any philosophical work. Rather, public dilemmas involving privacy will be resolved on a case by case basis, and each case will be contextually resolved. With regard to issues like the Patriot Act, then, the question will not be: does the Patriot Act violate individuals’ right to privacy? Rather, the questions will be: is there any good reason to prevent the government from inspecting peoples’ homes and hard drives without their knowing it? Who will be affected by such a policy and how will it benefit or harm them?

Now, the metaphysical claim that the public/private distinction is not founded on any fundamental aspect of human nature or the human condition is supposed to be supported by Geuss’ genealogical analysis. In the preface, Geuss says that the point of a genealogy is to trace the development of a contemporary phenomenon, e.g., a practice, institution, or identity, to its historical roots. This method operates under the assumption that:

The past in which a “genealogy” is interested is a “living” past, i.e., a past that still constitutes an effective part of the reality of the present, not a closed, “dead” past. History is a continuing series of transformations in which the old is not simply obliterated and utterly deleted, but is taken up and preserved in a modified form. (xii)

Institutions (and practices) develop and change over time; every generation inherits a set of understandings and practices already in place and already structured and entrenched in the social fabric. And each generation modifies that institution to suit its own needs. So in order to fully understand a particular institution such as the public/private sphere, Geuss thinks, it is important to engage in a genealogy. Often the genealogy reveals that the phenomenon in question does not have a single historical root. Rather, as we trace the history of the institution, we find different conceptions of and justifications for it at different times and places, all of which come together in the contemporary context to create the institutions and practices we have now:

Any significant human phenomenon that has succeeded in maintaining itself throughout a long history into the present...can be expected to be a highly stratified composite whose parts derive originally from different periods. The original rationale of each of these parts will have been oriented to a completely different (past) context of action. (xiii)

Herein lies the source of Geuss' skepticism about there being one underlying, fundamental human need or aspect of the human condition upon which the contemporary conception of the public/private distinction rests. Since the contemporary conception is a conglomeration of several distinct concepts that have different historical and conceptual roots and are responses to different human problems that arose in specific socio-historical circumstances, it is highly likely that the public/private distinction is not grounded in any fundamental facts about the human condition. That, in turn, means that it is unlikely that we will be able to draw any principled distinction between what is subsumed under the private realm and what is subsumed under the public realm. And that, in turn, means that when liberals appeal to privacy in policy debates, they are not really appealing to anything other than, perhaps, their own views about what sort of access others should have to one.

Geuss is careful to say that he is *not* arguing that the genealogy by itself is enough to show that there is no principled way to draw a distinction between the public and the private realm. Rather, the genealogy is one part of a broader critique of the attempt to draw such a distinction:

A genealogical account dissolves an appearance of unity – in this case the appearance that there is a single distinction between public and private. This, as I have said, is not in itself a criticism of the item of which it is a genealogy, but it does leave open the possibility that a genealogy may have a destructive effect in certain contexts, or indeed that it may be intentionally employed as *part* of a more general critical argument. (xvii)

Geuss' complaint against liberals is that in public debates liberals tend to appeal to the public/private distinction without giving any account of how exactly that distinction is to be drawn. And the genealogy shows that if we look at the various ways in which liberals appeal to the public/private distinction, we will find that they are all rooted in different aspects of the human condition, so that it is highly unlikely that it will be possible to provide the needed principle. I now turn to the issue of whether Geuss' argument is persuasive.

I think it is an important failing on Geuss' part that he does not give a specific example of the sort of case in which liberals tend to evoke the public/private distinction, such as the case of the Patriot Act. For when we *do* consider such cases, it becomes immediately apparent that the appeal is not to the *general* distinction between the public and the private realm, but rather to a specific component of the public/private distinction. In the case of the Patriot Act, for instance, the appeal is specifically to Pp. The claim is that the Patriot Act violates peoples' right to keep the information about what books they read (for instance) inaccessible to others without their permission. So the problem in this case is for liberal theorists to provide a principled distinction between what is protected by the right to privacy and what is not. The problem is, nothing in Geuss' argument suggests that this is not possible. For Geuss' *argument*, remember, is that our *general* conception of the public/private distinction, which is a conglomerate composed of (at least) Pi, Pd, Pp, and Pe, cannot be grounded on a single principle. But it is a non-sequitur to conclude, from the fact that there is no fundamental human problem to which Pi – Pd are a response, that neither Pd, nor Pi, nor Pe, nor Pp are based on a fundamental human problem to which *they* are a response. As Richard Kraut says:

[liberals] can happily agree that the distinction they want to draw is not quite like, or perhaps not anything like, the ones that are relevant in Geuss' discussion of Diogenes, Caesar, and Augustine. ...That there are several kinds of privacy does not impugn the

liberal doctrine that one or more of them are of great political significance and deserve protection. (Richard Kraut, *Notre Dame Philosophical Reviews*, <http://ndpr.nd.edu/.p.3>).

In short, Geuss' genealogy at most shows that we cannot draw a *general* distinction between the public realm and the private realm; it does not show that, for instance, we cannot draw a distinction between what is protected by the personal right to privacy and what is not. So although I think Geuss is correct to complain that too often liberal-minded people invoke the personal right to privacy where it may be inappropriate or at least questionable, he has not, so far as I can tell, given any argument to the effect that liberals cannot provide an acceptable account of what the right to privacy consists in and how it is grounded in some fundamental feature of human life. Here is what Geuss does say, in the concluding chapter, about Pp:

The purported “right to privacy” is unusual in that one can document the exact moment it was first formulated. It was invented in a paper written by Samuel Warren and Louis Brandeis in 1890. Warren’s wife, a rich society lady, deeply disapproved that newspapers were publishing reports about the parties she gave, and her husband set about concocting a reason for imposing restrictions on such reporting. Judith Jarvis Thomson has argued persuasively that this right does not exist in the sense that it fails to designate any kind of coherent single property or single interest. That does not mean that none of the various things that have come to be grouped under “privacy” are goods – far from it, many of them are extremely important and valuable—only that they are disparate goods, and the perfectly adequate grounds we have for trying to promote them have little to do with one another. (105).

This passage encapsulates Geuss’ overall method: argue that the historical root of the purported right (Warren’s wife’s embarrassment) is not a response to any fundamental human need, and then argue that no theoretical grounding for the right can be provided (by appeal to Thomson). The problem is that the first part of the argument is irrelevant to the important question of whether the right *can* be given a theoretical ground (notice that Geuss does not give Warren’s and Brandeis’ *argument* for the political right to privacy), and that Geuss doesn’t really pursue the second part of the argument.

Geuss *does* make some further arguments that bear on the right to privacy. He is critical of Mill’s view that what constitutes the private sphere are those actions which do not cause harm to others, because Geuss thinks people may reasonably disagree about what constitutes harm to others without there being any principled way to decide who is right. For instance, some members of my community may think that God holds the whole community responsible for individuals’ beliefs, so that if, for example, I have blasphemous beliefs, that will cause harm to the whole community. In that case, there will be disagreement between civil libertarians and others in my community over whether my blasphemous beliefs harm others and are therefore private. Geuss says:

The question is then: who does the evaluating? Liberals, of course, think they ought to have the final word, although they are generally careful to camouflage this as well as they can. In other words, it is the fact that liberals *think* that the beliefs of religiously minded persons (e.g., that God will hold *all* responsible for the heresies of any one member of the society) are false that is supposed to count as a reason for thinking that religious people have no grounds for the claim that heresy causes real "harm." It is not

clear, however, why this whole line of argument is saying anything more than this: if you have the views about reasonable belief and action that liberals prefer, you will endorse their policy proposals. (84)

I may be misreading Geuss here, but note that in the last sentence of this passage Geuss says that liberals *prefer* certain views about what counts as reasonable belief and what does not. This makes it sound as if accounts of reasonable belief are simply subjective, so that liberals have one account of what is reasonable and religious people have another, but there is no *good* reason to prefer one account over the other. I suppose then, that Geuss will say that when Jerry Falwell suggested that the bombing of the World Trade Center was partially the responsibility of abortion providers, gay persons, and the American Civil Liberties Union (presumably because they brought God's wrath upon the United States) that view is as reasonable as any other.¹ So when liberals say that a person's sexual orientation is a private matter, they beg the question against religious fundamentalists. But if there *are no* objective standards of evidence and criteria for reasonable argument, if liberals simply *prefer* their ways of deciding what is evidence and what is not over, say, religious fundamentalists' ways, then all political questions will have to be resolved by force or duplicity or some other form of coercion. It isn't clear, if Geuss is right, why we should rule out *any* claim about how an individual's beliefs or actions affect others, including, for instance, the belief that Allah, angry at Christians within the US for their infidelity, was punishing the whole country. But that is precisely the problem with invoking religious beliefs in public debate; it isn't that they are *false*, but rather that there is nothing that counts as an objective standard by which to test them. At any rate, what any of this has to do with whether there is good reason for recognizing a personal right to privacy is not clear.

Another argument Geuss makes against the liberal conception of the right to privacy is that even if we accept Alexander von Humboldt's perfectionism (he thought that the best life for humans is the life of self-development, creativity and experimentation), it does not follow that the best way to foster this sort of life is to provide a sphere of action to which others have no right to epistemic access and no right to interfere. Nor is there any way to empirically show that the inference holds, Geuss thinks, because the terms 'interference' and 'self-development' are not sufficiently clear. But then Geuss himself admits that we do not need perfectionism in order to argue for *anti-parentalism*, since anti-parentalism is also supported by the more plausible argument that what makes life good is a subjective matter and therefore individuals should be free to decide for themselves how to live and who to be. With regard to the right to limit epistemic access to information about ourselves, Geuss simply says:

It may well be the case that the liberal ideal of an individual subjectivity that has parts of itself barricaded off against all others should yield to an ideal derived from, or at least open to, the influence of the third of the French revolutionary slogans: fraternity. Many people have found it an attractive ideal to imagine a society where the barriers were lower, more flexible and permeable, less regulated by legal codes, and less strictly or uniformly enforced by coercive agencies of the government. ...Even if the above claim is true, that self-realization requires a sphere within which one can experiment and fail, it might not obviously follow that individuals must be protected from the social consequences of perceived failure. Why not change social attitudes so that failure has no stigma, rather than building up barriers of privacy? (93)

Well, sure, it might seem more attractive *to Geuss* to have less privacy and more acceptance by others, but how exactly does pointing out an alternative social structure constitute a *critique* of the contemporary liberal notion of privacy? Geuss does not give any reason to think that a social system that emphasizes fraternity at the expense of privacy is better. Furthermore, it seems to me that it is inconsistent to claim that individuals are free to experiment with different lifestyles and yet are not free of the social consequences of those experiments. Is it really honest to say that one believes that people should be free to engage in homosexuality but not free from social stigma, derision, and the threat of violence if they do so?² Finally, neither of these arguments helps the general argument that there is no principled way to draw the distinction between what falls under Pp and what does not.

Let me summarize the argument I have been making. According to Geuss, the public/private distinction as it exists in contemporary liberal societies is a conglomerate of several different public/private distinctions that had currency in radically different social contexts. Thus, it is highly unlikely that the general distinction between the public realm and the private realm can be drawn on the basis of any unitary principle that is itself based on some fundamental aspect of human nature or the human condition. So it is illegitimate for liberals to appeal to the right to privacy in public debates (such as the debate over the Patriot Act), because they have not, and probably can not, provide a principle for determining what is protected by that right and what is not. I have said that this final step is a non-sequitur, because it does not follow from the fact that there is no *general* distinction that can be made between the public realm and the private realm that no distinction can be made between what is protected by the right to personal privacy and what is not. This is not to say that I think Geuss is *wrong* about the claim that liberalism cannot provide a clear principle upon which to base the Pp, or, for that matter Pi, Pe, or Pd. But I do not think he provides enough argument to support it.

I now take up Geuss' challenge and pursue the question of whether the right to privacy can be grounded in any fundamental aspects of the human condition. I examine three different ways of attempting to provide such grounding: James Rachels' claim that the right to privacy is grounded in the human need for personal relationships, Alfino and Mayes' claim that it is grounded in the Kantian notion of autonomous moral decision making, and James Reiman's claim that it is grounded in the fact that privacy is a pre-condition for personhood.

I think of Geuss as having presented a skeptical challenge to liberal theory, a challenge he thinks (based in part on the genealogical analysis) it cannot meet. The challenge is to find some fundamental aspect of the human condition that explains why, for instance, personal privacy is important. More specifically, the argument will have to show that something fundamental to human life is protected by (1) protecting individuals' choice to have certain kinds information about them inaccessible to others and (2) protecting individuals from interference from others. (Hereafter I will refer to (1) as informational privacy, (2) as non-interference, and will use the term 'privacy' when I mean both). If we could show this, we would have the basis for the liberal claim that the state should recognize a right to privacy. But it is not clear what exactly 'fundamental' means in this context. Geuss gives the following as examples of things that are fundamental to human nature: human finitude, mutual ignorance, or the urges for self-preservation and self-assertion. This is unhelpful because it is difficult to see what they have in common. For instance, self-assertion seems to be a human good; but human finitude is not a part of the good life (at least not obviously)

and the urge for self-preservation is simply that: an instinctual urge. Perhaps what Guess has in mind is that the right to privacy should be grounded in something that is *universal* to human life. For now, let us proceed with the caveat that we still do not have a clear principle of what counts as a fundamental aspect of human nature that could provide a ground for the right to privacy; perhaps we can get clearer on what it means as we go along.

First is James Rachels' view that privacy is important because privacy is a necessary condition for forming different sorts of social relationships, which are part of the good of a human life (Rachels, p. 326). According to Rachels, "the sort of relationship that people have to one another involves a conception of how it is appropriate for them to behave with each other, and what is more, a conception of the kind and degree of knowledge concerning one another which it is appropriate for them to have" (328). For instance, part of what distinguishes friendships from romantic relationships is the amount of intimacy involved. But intimacy presupposes privacy, since to say that I have a more intimate relationship with A than I have with B, say, means that I allow A more access to information about me, and perhaps more influence over my personhood through my behavior or access to my body, than I allow B to have. If we do not have control over this aspect of our lives, then it will be impossible for us to form intimate relationships of our own choosing.

Is it possible to formulate an argument in favor of the political right to privacy on the basis of Rachels account of the value of privacy? Perhaps one could argue that since having personal relationships *is* fundamental to the human good and since persons could not enjoy that good unless they had control over the degree to which others had control over their behavior and access to information about them, we therefore have the basis for recognizing privacy as a fundamental moral right. And since the role of government is in part to protect fundamental moral rights, it follows that the state should recognize a right to privacy.

Rachels's view, however, seems to locate the value of privacy in the *wrong place*. To see why, consider that if, for instance, I am a hermit, unable or uninterested in having personal emotional relationships with others, that does not seem to be a good reason for thinking that preventing others from having access to certain kinds of information about me will not be important for me or that I should not have the same right to do so as others. But given Rachels' account of the basis for privacy, it is hard to see how this is so. It also does not seem to explain the fact that many or most people want some degree of privacy even *within* their most intimate relationships. In fact, precisely this point is raised by feminist critics of the liberal right to privacy. As these critics point out, historically, men have been able to physically and sexually abuse their wives without having to fear legal punishment because the law has treated the marriage relationship as *private* and therefore as demarcating a sphere in which the government may not interfere. That is, conceiving of privacy as important only because it is a condition for intimate relationships tends to support the supposition that, within an intimate relationship, there is no right to privacy that either party can legitimately invoke. And that, in turn, has led to the protection of activities that support the oppression of women.

Furthermore, it should be remembered that the issue at hand is whether the state ought to protect the individual sphere of control I described earlier. Now, it is controversial whether the role of the state is to *promote* the good life for persons. That is, a libertarian, for instance, might say that the role of the state is not to provide the means for individual flourishing (which includes making and having intimate friendships) but is rather simply to protect the natural rights of individuals. My

point is that even if we admit that having personal relationships is universally part of the good life and that privacy is a prerequisite for such relationships, it is not clear that it follows that people should have the *political right* to privacy unless we assume that the state should promote the good life for individuals.

In a more recent paper, Mark Alfino and G. Randolph Mayes attempt to give an account of privacy that justifies it as a fundamental moral right (Alfino and Mayes, p. 2), by which they mean it is grounded in the conditions for personhood. For Alfino and Mayes, political rights are important only because rights create a protective sphere within which individuals can make autonomous decisions, that being a necessary condition for moral agency (which in turn is a necessary condition of personhood). But as the authors infer, if privacy is important only because it protects the individual from undue interference from others with regard to her/his moral reflection, there is no basis for a political right to privacy *beyond* the right to be free from the interference of others in one's autonomous decision making.

Alfino and Mayes' account of privacy yields the result that covertly spying on a person, even when that person is engaged in activities that we would normally think of as the *most* private, is not an invasion of the person's privacy, since, being covert, it does not restrict the person's ability to exercise her/his rational decision making. On the other hand, their view also seems to imply that openly watching another person who does not want to be watched (walking through the mall, for instance) will affect that person's ability to make an autonomous decision. So if Alfino and Mayes are correct, it turns out that covertly watching a person undress or shower or masturbate does not violate that person's privacy, but watching the person walk across the mall in such a way that the person is aware sh/e is being watched *does*!

The authors acknowledge that this result might be seen as "awkward, if not patently absurd" (15). In response, they make three points: first, they say, "we believe that the epitome of a privacy violation does not consist in coming to know things about a person, but rather...in *invading* a person's space" (15). But that is simply to reiterate their conclusion, not a response to the claim that their conclusion seems absurd. Second, the authors claim that, although their argument implies that it is not a violation of a person's privacy to covertly spy on that person, their view does not imply that spying is morally acceptable. But again, that evades the objection, which is that it seems that covertly spying on a person while that person is having sex, or taking a shower, or using the toilet is a *paradigm case* of a violation of that person's privacy and is wrong *for that reason* (why would it not be morally acceptable otherwise?). Ultimately, though, their answer to the objection is something like this: the attacks on the World Trade Center on September 11, 2001 made it clear that terrorists are willing and able to kill thousands or millions. And although most of us think that our privacy is being violated when someone – the government, say – eavesdrops on us or reads our mail or finds out how much money we have in our savings account, we should – and many of us do -- no longer see it as a violation of our privacy but as a way of ensuring our safety. So we have no good reason to insist on a political right to informational privacy. This argument is along the lines of the Deweyan conception of how such arguments should go; rather than attempting to capture some fundamental principle by which the right to privacy can be drawn, the authors instead argue that, given the new social reality, we must *reconceive* the right to privacy.

As I noted, Alfino and Mayes further argue that their account gives us a reason to find it acceptable

for the government to covertly spy on its citizens in the name of privacy. They write:

...we are skeptical of the suggestion that normal people could not function in a society that does not view informational privacy as a fundamental right. Indeed, public response to the September 11 tragedy provides strong evidence to the contrary. What most of us discovered is that it is impossible to exercise our practical reason in an environment that promises random acts of violence. ...Big Brother's watchful eye is no longer experienced as a threat to privacy, but as a precondition of securing it (16).

The conclusion that we need not view informational privacy as an important right is too strong. If Alfino and Mayes are right, *covertly spying* on a person does not violate that person's autonomy. But it does not follow that persons do not have an interest in being able to prevent others from knowing everything about one, since it is certainly true that, *if I have reason to think others will know what I am doing*, I may choose not to do it. So there might still be some important interest in keeping certain information about oneself private. Their point, I think, is that informational privacy is only important because violating it may affect one's autonomous decision making, so it is not a fundamental value in and of itself, but only valuable because it is sometimes a necessary condition for autonomous decision making. Alfino and Mayes do say they are skeptical of the claim that normal people could not function in a society that does not view informational privacy as a fundamental right. That skepticism seems, as I have said, unfounded, though it depends on what they mean by 'function'. But if people thought that there was no activity they could engage in without fear of someone else observing them, I think that would very much interfere with people's decision about whether to engage in certain activities. Of course, much depends on how closely one is being watched and by whom. Perhaps it won't affect what I say in my e-mails if I think government computers are randomly searching the internet for 'chatter' that sounds threatening (even there I can imagine not saying something I may want to say). On the other hand, if I think the government has people checking to see what books I read and to whom I speak on the telephone, that will certainly affect what I choose to read, which seems clearly to be an interference with my function.

Alfino's and Mayes' argument puts enormous weight on the assumption that the terrorist threat is real and dire and the claim that government spying is an important way to deal with the threat. But in so arguing, they seem to ignore the threat posed by the Big Brother they see as our protector. Now, one might be willing to grant that *in theory*, if there were a perfectly benevolent Big Brother whose only interest was in protecting each of us from terrorist attacks and who, we could be sure, would never use such information for any purposes beyond security, government spying may not violate any important right, especially if none of us knows we are being watched. But the attacks on the World Trade Center did not change the fact that it is very difficult to imagine such an ideal Big Brother actually existing. People fear Big Brother precisely because they fear that the state will not simply watch us but will attempt to gather information in order to control us. The attacks on the World Trade Center did not change the nature of Big Brother.

Here is another problem with Alfino's and Mayes' view. Even granting for the sake of argument that the government's covertly spying on me cannot affect my autonomous decision making, in order to *democratically* institute a policy of having the government spy on individuals, most of us have to be aware that the government might spy on us. But even that will affect individuals' autonomous decision making. If I know that the government, say, may have tapped my phone or

may have cameras covertly placed on the street outside my house, that surely will affect my choices about what to say and do. So it seems that in order to institute the policy Alfino and Mayes propose, the government would have to do so covertly. But that seems to undermine the democratic ideals we are supposedly protecting.

I now turn to Jeffrey Reiman's claim that privacy is "an essential part of the complex social practice by means of which the social group recognizes – and communicates to the individual – that his existence is his own" (Reiman, p. 39). If we assume, with Reiman, that selves are socially constructed, it seems that privacy is a precondition for the existence of individual selves. If Reiman's view is correct, it stands as a refutation of Geuss' claim that there is no fundamental aspect of the human condition that is captured by the notion of privacy.

Reiman's point is that the social practice of respecting the privacy of persons is also essential to the creation of individual selves. The various things considered to be private – my own thoughts, my property, my body, information about my body and my history, my particular relationships with others – are ways of constructing the social and physical space within which individual selves can exist, because they create the barriers that prevent all selves from collapsing into one.

In support of this, consider Reiman's discussion of Erving Goffman's work on "total institutions". Total institutions, Goffman says, have as their goal "the mortification of the self", and one important element in this killing off of selves is to deny them privacy, as in prisons or mental wards. Prisoners, for instance, are maintained in cells that make it impossible for them to prevent others from constantly watching them; and it is a well known feature of religious cults that one way in which they gain converts is by making sure that prospective converts are never given any time away from the group. Or consider how totalitarian governments work. Reiman says:

Totalitarianism is the political condition that obtains when a state takes on the characteristics of a total institution. For a society to exist in which individuals do not own their bodies, what is necessary is that people not be treated as if entitled to control what the bodies they can feel and move do, or what is done to those bodies -- in particular that they not be treated as if entitled to determine when and by whom that body is experienced (41).

By stripping people of control over their bodies and access by others to their bodies, totalitarian governments destroy personhood. So the idea is that privacy is a set of social conventions that demarcate one self from another.

If Reiman is right, we then have the makings of an argument for why there should be the political right to privacy. Having privacy is partially *constitutive* of individuals. As such, it is of fundamental importance that individuals have the means to protect their privacy. And it is reasonable to think that the role of government is to protect individuals from destruction. So there is good reason for recognizing at least *some* political rights to privacy.

Reimans' theory does have the virtue of grounding both senses of the right to privacy I mentioned above. It explains why we should have the right to privacy in the sense of the right not to have the government intervene in our personal lives because, as we have seen, control over our own bodies and our ability to make autonomous decisions is necessary for personhood. And it explains why we

should have the right to control who has access to information about ourselves: a world in which anyone and everyone could watch me even when I do not want to be watched is a world that deprives me of the conditions for personhood. That is a fundamental and universal aspect of the human condition. Notice, however, that it does not give us much help in determining how exactly to draw the line between what should be considered protected under Pp and what should not. For the appeal to Goffman shows that when persons have no control whatsoever over their bodies, their personhood is destroyed. But that clearly does not show that any time they have to relinquish any control their personhood is destroyed. We still, if Reiman is right, don't know just how much and over which parts of themselves individuals need control.

So I think this is basically the correct account of the basis for the political right to privacy. Notice, however, that this insight about the relationship between privacy and selves will not help the civil libertarian in her/his claim that, say, the Patriot Act violates the right to privacy. On the account in question, selves are constructed from the various social practices that are involved in exercising the right to privacy. But although the existence of selves depends on their being *some* privacy rights, which *specific* privacy rights a person should have remains an open question. That is, I can imagine someone arguing that although there must be *some* sense in which individuals have a right to privacy, it is not necessary that 'the right not to have the government covertly examine the contents of one's computer hard drive' be part of one's right to privacy. In short, the claim that the right to privacy is important because it is a condition for their being selves does not say what specific rights to privacy society should recognize. As such, it will not help the liberal targets of Geuss' critique.

The conclusion I draw from this discussion is that although Geuss does not make a persuasive case that there is no fundamental aspect of human life on which the right to privacy can be grounded, he is right to say that it is not enough, in policy debates like the debate over the Patriot Act, for liberals simply to appeal to the right to privacy in saying that the law should be rejected. For even if we say, with Reiman, that we should have some rights to privacy because such rights protect that which is a condition for personhood, this does not tell us much about what specific things should fall under that right or how we are to decide. On the other hand, if Reiman is right then there will be a limit on how far, for instance, government spying on individuals should be allowed to go, even in the name of security. But where to draw that limit will depend on the circumstances under which the policy is discussed.

So, how powerful is Geuss' critique of liberalism? I do not think Geuss has shown that liberalism cannot provide a theoretical basis for the right to privacy, so it does not seem to me that Geuss can be said to have given any argument that fundamentally undermines liberal *theory*. That is, I do not think that Geuss has shown that it is not possible to ground the claim that individuals should have the political right to privacy on some fundamental aspect of the human condition. On the other hand, I think that Geuss is right to say that it is insufficient in policy debates to simply argue that this or that policy is wrong because it violates peoples' right to privacy. This is not to say that we should not recognize any right to privacy. But in what exactly that right consists, and thus whether it is violated by this or that particular policy, can only be decided by looking at the details of the case in question.

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Notes

1. "I really believe that the pagans, and the abortionists, and the feminists, and the gays and the lesbians who are actively trying to make that an alternative lifestyle, the ACLU, People For the American Way, all of them who have tried to secularize America. I point the finger in their face and say 'you helped this happen.'" It should be noted that Falwell later apologized for the remark. <http://archives.cnn.com/2001/US/09/14/Falwell.apology/>.

2. I once saw a television news story about a person who burned a US flag on the steps of his local courthouse. The newsperson interviewed a witness who said: "I think he should have the right to burn a flag, but I should have the right to kick his ass if he does". Can it really be said that this person believes that people have a right to burn the flag?